

No. 76-895

Supreme Court, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

BRUCE WHEATON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 546 F. 2d 6.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1976. The petition for a writ of certiorari was filed on December 29, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient independent evidence of petitioner's participation in the conspiracy charged in the indictment to allow the admission of hearsay declarations by petitioner's co-conspirators.

2. Whether the court of appeals erred in receiving and considering a post-argument legal memorandum from the government.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to manufacture, import, and distribute heroin, in violation of 21 U.S.C. 846 and 963, and two counts of importing and distributing heroin, in violation of 21 U.S.C. 841 and 952(a).¹ Petitioner was sentenced to three concurrent terms of 15 years' imprisonment, to be followed by a special parole term of three years. The court of appeals affirmed (Pet. App. 1-8).

The evidence revealed that petitioner participated in an international narcotics conspiracy that was responsible for smuggling large amounts of heroin from Bangkok, Thailand, to the United States during the early part of 1976. The heroin was secreted in packages and mailed through the United States Air Force postal system from Bangkok to New York and other parts of the United States (Tr. 13-16, 17-27, 72-73, 109-112). Co-defendant Donald Head, a staff sergeant stationed at the air mail terminal at Don Munag Airport outside Bangkok, was the key man in the smuggling operation. As chief supervisor of a shift, Head received, dispatched, and inspected all incoming and outgoing mail and developed a method of packaging heroin for shipment through the mails so that it would escape detection by trained dogs or x-ray machines. Petitioner, an ex-Air Force

¹Co-defendant Donald Head was tried separately and convicted on the same three counts. Co-defendant Boonsak Phuvasitkul pleaded guilty to two counts of distribution of heroin, in violation of 21 U.S.C. 841, and testified for the government at trial. Co-defendants Boonterm Petkamnerd, Perm Petkamnerd, and Manop Saiphantong were and remain fugitives.

serviceman, received some of these shipments and sold and distributed their contents (Tr. 27-29, 45-47, 53-55, 81-82).

In late January 1976, co-defendant Phuvasitkul negotiated to sell a unit of heroin to Jack Taylor, an undercover agent of the Drug Enforcement Administration (Tr. 22-23, 72-73; G.X. 50, 50A, 51, 51A). Thereafter, at a meeting in Bangkok on February 4, 1976, Phuvasitkul persuaded Head to mail a package containing 638 grams of pure heroin to a post office address in New York City, where it was seized by a D.E.A. agent (Tr. 24-27, 115-116; G.X. 1, 1A). While en route to the United States to pick up the money for the heroin Head had mailed, Phuvasitkul met Agent Taylor in Toronto, where arrangements for payment were discussed. Phuvasitkul told the agent that he also was going to the United States to collect money that petitioner owed his supplier, co-defendant Boonterm Petkamnerd. Upon his arrival in New York, Phuvasitkul was arrested (Tr. 48-53, 73-81, 90, 94-96).

After Phuvasitkul's arrest, he agreed to cooperate with the government (Tr. 53). Phuvasitkul told the D.E.A. agents that Boonterm had informed him that petitioner had visited Thailand in February and had purchased two or three units of heroin, which were then mailed to him in the United States. This information was confirmed by the agents by taping telephone conversations, with Phuvasitkul's consent, between Phuvasitkul and co-defendant Manop Saiphantong and between Phuvasitkul and Head, and by intercepting a letter (pursuant to a search warrant) in which Boonterm told petitioner that 300 grams of heroin were being sent to him (Pet. 6; Tr. 49, 53-54, 81-82, 107; G.X. 18, 20, 64, 64A, 66, 66A). In addition, the agents recorded a conversation between Phuvasitkul and petitioner in which petitioner was informed that his supplier had sent him two more units of heroin (Pet. 4-6). During this conversation, petitioner stated

that he would send the money directly to the supplier in Thailand if he agreed to sell the units, but that he was reluctant to discuss on the phone how much he might be able to obtain for the drugs (Tr. 55; G.X. 67, 67A).

Petitioner was arrested on March 23, 1976. His passport indicated that he had traveled to Thailand on February 26, 1976, and had departed on March 5, 1976 (Tr. 118; G.X. 70, 100, 101).

ARGUMENT

1. Petitioner contends (Pet. 9-16) that hearsay declarations of his alleged co-conspirators should not have been admitted into evidence because there was insufficient independent proof of his participation in the conspiracy. This argument is answered fully by the opinion of the court of appeals (Pet. App. 7-8), upon which we rely.

2. Petitioner also contends (Pet. 16-18) that the court of appeals committed prejudicial error by receiving and considering a letter (Pet. App. 9-11) which was filed by the Assistant United States Attorney subsequent to oral argument. Although petitioner admits (Pet. 16) that he received a copy of the letter, which addressed questions raised by the court during oral argument, he complains that the court of appeals denied him permission to respond. This is incorrect. The docket sheet of the court of appeals reveals that on October 20, 1976, petitioner's counsel sought leave, by telephone, to file a responsive letter. The court notified counsel that, if he wished to submit a reply, it would be accepted for filing. Although the case was not decided until one month later, petitioner chose not to file a reply. Accordingly, it was not improper for the court of appeals to rely on the government's post-argument memorandum.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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